

STATE OF MICHIGAN
COURT OF APPEALS

JOHN T. HUSINKA and KRISTINA R.
HUSINKA,

UNPUBLISHED
February 28, 2006

Plaintiffs-Appellees,

v

No. 263826
Wayne Circuit Court
LC No. 04-437916-AV

REAL ESTATE UNLIMITED, INC., and HARRY
CASSIDY,

Defendants/Cross Defendants-
Appellants,

and

SANDRA L. BUSS,

Defendant/Cross Plaintiff-Appellant.

Before: Borrello, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Defendants appeal by leave granted from a circuit court order reversing in part a district court order granting their motions for summary disposition. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions, and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. Summary disposition is appropriate only if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

The elements of fraud are (1) the defendant made a material representation to the plaintiff; (2) the representation was false; (3) the defendant knew the representation was false or made it recklessly as a positive assertion without knowledge of its truth; (4) the defendant

intended that the plaintiff rely on the representation; (5) the plaintiff acted in reliance on the representation; and (6) the plaintiff was injured as a result of such reliance. *Hord v Environmental Research Inst of Michigan (After Remand)*, 463 Mich 399, 404; 617 NW2d 543 (2000). The misrepresentation must be predicated on a statement of past or existing fact. *Michaels v Amway Corp*, 206 Mich App 644, 652; 522 NW2d 703 (1994).

Defendants placed a brochure outside a house Buss placed for sale through the services of defendants Real Estate Unlimited and Cassidy. The brochure stated that the basement had been waterproofed and that the work came with a transferable warranty. Such a representation related to a past or existing fact. While Buss indicated the basement had been waterproofed, there was no evidence that she said anything about a warranty; therefore, Cassidy acted recklessly without knowledge of the truth. Inasmuch as the statement was part of a brochure advertising the house for sale, it can be assumed that defendants intended that the buyer rely on the representation.

The primary issue is that of reliance. While plaintiffs contend that they relied on the misrepresentation in deciding to buy the house, “[a] misrepresentation claim requires reasonable reliance on a false representation.” *Nieves v Bell Industries, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994). Accord, *Foreman v Foreman*, 266 Mich App 132, 141-142; 701 NW2d 167 (2005); *Bergen v Baker*, 264 Mich App 376, 389; 691 NW2d 770 (2004); *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 689-691; 599 NW2d 546 (1999). Because reliance must be reasonable, “there can be no fraud where the means of knowledge regarding the truthfulness of the representation are available to the plaintiff and the degree of their utilization has not been prohibited by the defendant.” *Webb v First of Michigan Corp*, 195 Mich App 470, 474; 491 NW2d 851 (1992). “But in cases where this rule has been applied, the plaintiffs were either presented with the information and chose to ignore it or had some other indication that further inquiry was needed.” *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 501; 686 NW2d 770 (2004).

Plaintiffs had information that the basement waterproofing came with a transferable warranty, which implied that the waterproofing had been done by a company that had issued the warranty. However, they subsequently obtained the list ticket, which referred only to a waterproofed basement without mentioning any warranty. In addition, plaintiffs’ home inspector indicated that he was unfamiliar with the type of work involved, which called into question whether a waterproofing company had done the work. Further, he specifically advised plaintiffs “to inquire about warranty and transferability.” Given that plaintiffs had specific information indicating that further inquiry was needed regarding the truth of the representation and did nothing, their reliance on the representation was not reasonable. The circuit court erred by reversing the district court’s grant of defendants’ motions for summary disposition.

Reversed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald